IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JONATHAN BLADES and ANTWAN BUCHANAN, *individually and on behalf of all others similarly situated*,

Plaintiffs,

v.

MERRICK B. GARLAND, *in his official capacity as Attorney General*; FEDERAL BUREAU OF PRISONS; and MICHAEL CARVAJAL, *in his official capacity as Director of the Federal Bureau of Prisons*,

Defendants.

Case No. 1:22-cv-00279-ABJ

BRIEF OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND INTEREST OF AMICUS

Pursuant to Local Civil Rule 7(o)(1), the District of Columbia files this brief as amicus curiae in support of the plaintiffs' motion for summary judgment.

Due to the District's "unique constitutional position," *Banner v. United States*, 303 F. Supp. 2d 1, 3 (D.D.C. 2004), *aff'd*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), the District's criminal justice system splits responsibilities between the federal and District governments. Specifically, the federal Bureau of Prisons is responsible for the custody of individuals convicted of felonies under the D.C. Code ("District offenders"). In discharging that responsibility, however, the Bureau does not treat District and federal offenders alike. Rather, the Bureau uses a different scoring system for District offenders when calculating a criminal history score that determines, among other things, an inmate's security classification. Administrative Record ("AR") 35-36; *see generally* Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' Br.") 4-6. This disparate scoring system often results in a higher score, and therefore a higher security classification, for District offenders with essentially identical criminal histories. Pls.' Br. 6-10. Not only does this scoring system discriminate against District offenders, but its effects disproportionately fall on Black inmates because nearly all District offenders are Black. Pls.' Br. 22.

Although the Bureau has responsibility for the custody of District offenders, the Attorney General for the District of Columbia "has an interest . . . in the enforcement of the criminal laws of the District of Columbia," *Crockett v. District of Columbia*, 95 A.3d 601, 605 (D.C. 2014), because he has "charge and conduct of all law business of the . . . District" and is "responsible for upholding the public interest" of the District, D.C. Code § 1-301.81(a)(1). The Attorney General thus has an interest in how individuals subject to the District's criminal justice system are treated throughout the criminal process—including in custody.

To vindicate that interest, the Attorney General files this brief to explain why the Court should end the Bureau of Prisons' disparate scoring system under settled principles from the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. For one, the scoring system's intentional discrimination against District offenders violates—or is at least in substantial tension with—provisions of the federal statute that transferred custody of District offenders to the Bureau. And the system's impact on Black inmates violates Bureau regulations and policy. The Bureau's failure to explain how its disparate scoring system comports with these various provisions renders it arbitrary and capricious under the APA. Further, by skirting notice-and-comment rulemaking when enacting the scoring system, the Bureau deprived a key stakeholder in the District's criminal justice system—the Attorney General—from weighing in. These deficiencies warrant vacatur, and to the extent the Court also considers injunctive relief, an injunction would serve the public interest of the District by ensuring compliance with federal law governing federal-District relations, maintaining equal treatment in prisons, and achieving an equitable criminal justice system.

BACKGROUND

1. The History Behind The Bureau's Responsibility For District Offenders.

For nearly two centuries, Congress exclusively controlled the affairs of the District of Columbia. *See Banner*, 303 F. Supp. 2d at 4. In 1973, however, Congress passed the Home Rule Act, which granted the District a limited form of self-governance. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 *et seq.*). The Act vested the District with some powers and responsibilities of a state, including maintaining a prison system. Jon Bouker, *The D.C. Revitalization Act: History, Provisions, and Promises*, *in* Building the Best Capital City in

the World: A Report by DC Appleseed and Our Nation's Capital 83, 85 (2008).[1] At the same time, the Act withheld crucial revenue-raising powers enjoyed by states. *Id.* at 85-86. Thanks to this catch-22, by the mid-1990s, the District was forced into a financial crisis. *Id.*

In response, the White House proposed a plan to shift some of the state responsibilities given to the District with the Home Rule Act to the federal government. *Id.* at 87. Among them was felon incarceration, with a plan for the Bureau of Prisons to house District offenders. *See id.* at 90. Notably, from the inception of this plan, the White House explained that "[i]t is . . . important to have some consistency with the procedures that affect Federal prisoners, because it is clear that some District prisoners will need to be in facilities other than those in the local area, and therefore we are concerned that there be some consistency in sentences." *White House Proposal for the District of Columbia: Hearing Before the Subcomm. on the Dist. of Columbia of the H. Comm. on Gov't Reform & Oversight*, 105th Cong. 29 (1997) (statement of Frank Raines, Dir., Off. of Mgmt. & Budget). The White House originally went as far as suggesting that the District would need to adopt the U.S. Sentencing Guidelines. Robert L. Wilkins, *Federal Influence on Sentencing Policy in the District of Columbia: An Oppressive and Dangerous Experiment*, 11 Fed. Sent'g Rep. 143, 143 (1998). That approach was controversial: the D.C. Council did not agree that such an incursion on the District's authority over its criminal laws was necessary to achieve efficient prison administration. *See id.* at 143-44; *The White House Proposal for the District of Columbia: Joint Hearing Before the Subcomm. on the Dist. of Columbia of the H. Comm. on Gov't Reform & Oversight & the Subcomm. on Oversight of Gov't Mgmt., Restructuring & the Dist. of Columbia of the S. Comm. of Gov't Affairs*, 105th Cong. 86-87 (1997) (statement of Charlene Drew Jarvis, Chairwoman, Pro Tempore, D.C. Council). District

[1] *Available at* https://tinyurl.com/5n8hr3s9.

and federal stakeholders engaged in negotiations on the conditions of the Bureau's assumption of District offenders, and the District ended up ceding much of its authority to the federal government regarding sentencing. Wilkins, *supra*, at 143-44.

The resulting legislation was the "Revitalization Act," which, among other things, transferred custody of District offenders to the Bureau. National Capital Revitalization and Self-Government Improvement Act of 1997, § 11201(a) to (b), Pub. L. No. 105-33, 111 Stat. 712, 734 (codified in relevant part at D.C. Code § 24-101(a) to (b)). The Act's text captured the White House's commitment to consistency by instructing that District offenders "shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed." D.C. Code § 24-101(a). The Act also created a commission, the District of Columbia Truth in Sentencing Commission, comprised of federal and District representatives to make recommendations regarding changes to sentencing for D.C. Code offenses to more closely match federal sentences. *Richardson v. United States*, 927 A.2d 1137, 1139-40 (D.C. 2007). The creation of this commission began a decades-long process of recommendations and amendments to sentencing under the D.C. Code, which continues today with the District of Columbia Sentencing Commission, *see* D.C. Sent'g Comm'n, *History of the District of Columbia Sentencing and Criminal Code Revision Commission*,[2] of which the District's Attorney General is a member, D.C. Code § 3-102(a)(1)(E).

2. The Current State Of The Bureau's Custody Of District Offenders.

Today, thousands of District offenders move through the Bureau's custody. In recent, pre-pandemic years, the Superior Court disposed of anywhere between 3,000 to almost 5,000 felony

[2] *Available at* https://tinyurl.com/4z4jst6h (last visited Apr. 8, 2022).

cases a year. D.C. Cts., *Statistical Summary* 6 (2021).[3] (In contrast, this Court usually terminates a few hundred criminal cases per year.[4]) Most recently, in October 2021, the Bureau reported 2,548 District offenders in its custody, D.C. Corrs. Info. Council, *2021 Annual Report* 7,[5] although the count was as high as 4,600 offenders as recently as 2020, Council for Ct. Excellence, *Analysis of BOP Data Snapshot from July 4, 2020 for the District Task Force on Jails & Justice* 1 (Sept. 30, 2020).[6] In one snapshot of District offenders in Bureau custody, more than 95% of those offenders were Black males. *Id.* Half of those offenders were scheduled to be released within two years. *Id.* at 11-12. And most were classified as medium or high security. *Id.* at 4.

This unique scenario—in which the federal government is responsible for, effectively, state prisoners—creates challenges. Most problematic, two-thirds of District offenders are sent to Bureau facilities outside the region, making communications with loved ones and reentry difficult. NBC 4 Wash., *Two-Thirds of DC Felons Serve Prison Sentences Outside the Region* (Aug. 7, 2019).[7] Indeed, according to one survey, 62.3% of District offenders would prefer to serve their sentence in a prison in the District, versus 21.3% who would not. Bailey Gilmore, Nat'l Reentry Network for Returning Citizens, *DC Prison Population Survey* 5 (Dec. 2020).[8] And 70% support building a District prison, versus 14% who did not. *Id.* at 6.

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[3] *Available at* https://tinyurl.com/22tdmhdp. Because court operations were modified or reduced when the COVID-19 pandemic began in early 2020 and are still returning to normal, *see Statistical Summary*, *supra*, at i, earlier data is more representative.

[4] *E.g.*, U.S. Cts., *Table D Cases—U.S. District Courts–Criminal Statistical Tables for the Federal Judiciary (December 31, 2019)*, https://tinyurl.com/4mbbh9zz (download data table); U.S. Cts., *Table D—U.S. District Courts–Criminal Statistical Tables for the Federal Judiciary (December 31, 2017)*, https://tinyurl.com/3fkxumba (download data table).

[5] *Available at* https://tinyurl.com/atydndxv (last visited Apr. 8, 2022).

[6] *Available at* https://tinyurl.com/24nebtb3.

[7] *Available at* https://tinyurl.com/yk4xz6u9.

[8] *Available at* https://tinyurl.com/2p8mnm9c.

In addition to geographic challenges, other problems arise from the fact that the Bureau is not part of the District government. For example, District officials have asked the Bureau to share information about District residents leaving its custody so that the District can engage in reentry efforts. *See, e.g.*, Congresswoman Eleanor Holmes Norton, Press Release, *Norton Asks Bureau of Prisons to Share Information on D.C. Residents Leaving Custody and Returning to Community* (Apr. 12, 2021).[9] But the Bureau has refused to share that information, citing its shifting interpretation of federal law. *Id.* In another example, the District enacted legislation giving incarcerated people the right to vote. Julie Zauzmer Weil & Ovetta Wiggins, *D.C. and Maryland Have New Policies Allowing Prisoners to Vote. Making It Happen Is Hard*, Wash. Post (Sept. 28, 2020).[10] But the Bureau refused to provide critical information or assistance to the District's Board of Elections so that District offenders could exercise that right. *Id.*

Moreover, the Bureau's custody of District offenders has resulted in documented mistreatment of those offenders precisely because they are from the District. The D.C. Corrections Information Council, an independent oversight board created by Congress, regularly inspects Bureau facilities, meets with District offenders, and reports on their experiences. D.C. Corrs. Info. Council, *2021 Annual Report*, *supra*, at 1. These reports reveal that District offenders—at facilities across the nation and over many years—have experienced targeted mistreatment.

To illustrate, an overwhelming majority of District offenders surveyed report that District offenders are treated worse than other inmates by Bureau staff. *E.g.*, D.C. Corrs. Info. Council, *FCI Allenwood Medium Inspection Report* 35 (Jan. 9, 2017) (95%);[11] D.C. Corrs. Info. Council,

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9 *Available at* https://tinyurl.com/ywrjbpsp.

10 *Available at* https://tinyurl.com/4a7mttmw.

11 *Available at* https://tinyurl.com/bdzzmyrj.

FCI Beckley Inspection Report 7 (Apr. 6, 2018) (90%);[12] D.C. Corrs. Info. Council, *USP Terre Haute Inspection Report* 31 (June 15, 2017) (80%).[13] This mistreatment manifests in several ways: District offenders "are stereotyped as being aggressive and gang members solely because they are from DC." D.C. Corrs. Info. Council, *FCI McDowell Inspection Report* 10 (Oct. 17, 2019).[14] Bureau staff even have their own pejorative for District offenders, "007" (which derives from the registration number given to District offenders that usually ends in 007). *Id.* at 2 n.1, 10. This stereotyping has concrete effects, as "it is harder for individuals from DC to get into programming or get facility jobs." *Id.* at 10. Indeed, a Bureau staff member himself told inspectors that he capped the number of District offenders allowed to participate in certain programs. *Id.*; *see also USP Terre Haute*, *supra*, at 32 (reporting "implicit quotas for hiring DC inmates"). Further, District offenders are "treated roughly and searched more frequently." D.C. Corrs. Info. Council, *USP Tucson Inspection Report* 33 (Apr. 4, 2017).[15] Overall, only around 15% of District offenders in one survey reported that Bureau staff was usually responsive, professional, or respectful. *FCI McDowell*, *supra*, at 11.

Finally, and most pertinent here, the Bureau has imposed a starkly different system for District offenders versus federal offenders to assign security classifications. To assign inmates a security classification, the Bureau uses, as one factor, a criminal history score which attempts to quantify an inmate's prior criminal history by assigning points to prior convictions. *See* AR 12-13, 35. For federal offenders, the U.S. Sentencing Guidelines contain a criminal history scoring system dictating how many points are assigned to what offenses, and a criminal history score for

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12 *Available at* https://tinyurl.com/3usssw9t.

13 *Available at* https://tinyurl.com/4n67td57.

14 *Available at* https://tinyurl.com/mszx5ht6.

15 *Available at* https://tinyurl.com/4kt767vm.

a federal defendant is calculated at sentencing. U.S. Sent'g Guidelines Manual §§ 4A1.1.-4A1.2 (U.S. Sent'g Comm'n 2022). When the Bureau takes custody of the federal defendant, the Bureau uses that criminal history score (with a simple conversion) when making a classification decision. AR 35.

District offenders, however, are not sentenced pursuant to the U.S. Sentencing Guidelines, so they arrive in Bureau custody without a criminal history score under those Guidelines. Pls.' Br. 4-5. But instead of applying the Sentencing Guidelines' scoring system to District offenders' criminal histories, the Bureau uses a different scoring system entirely. AR 35-36. Importantly, the two systems do not assign points in the same ways. For example, the U.S. Sentencing Guidelines do not assign points for sentences for certain misdemeanor or petty offenses. U.S. Sent'g Guidelines Manual § 4A1.2(c). But the Bureau's scoring system for District offenders makes no such exemption. *See* AR 35-36. The result of this disparity and others is that District offenders often have higher criminal history scores than federal offenders despite having essentially identical criminal histories. Pls.' Br. 6-8. And that means that District offenders are put into higher security facilities, with all of the attendant risks and disadvantages. Pls.' Br. 2, 8-9.

SUMMARY OF ARGUMENT

1. The Bureau's scoring system is arbitrary and capricious for at least two reasons germane to the District's interests. First, it violates—or at least is in substantial tension with—the Revitalization Act, which by its text and purpose provides that District offenders should be subject to the same policies as federal offenders. Second, the system adversely affects Black inmates almost exclusively, contradicting the Bureau's own commitments in both a regulation and Program Statement to ending policies with a disparate impact on inmates of one race.

2. The scoring system is also procedurally infirm because the Bureau failed to promulgate it with notice-and-comment rulemaking. This deprived the Attorney General, among others, of

the opportunity to discuss the scoring system with the Bureau before it adopted the disparity. As the representative of District residents and a key stakeholder in the District's criminal justice system, as well as a member of the District's sentencing commission, the Attorney General is an interested person who could have meaningfully contributed to the Bureau's policymaking and corrected the Bureau's misguided approach.

3. To the extent the Court considers injunctive relief, the Court should consider the public interest of the District and its residents, including District offenders, as much as the federal government's interest. An injunction would serve the District's interests in ensuring adherence to the Revitalization Act, maintaining equal treatment in prisons, and achieving the District's objectives for criminal justice.

ARGUMENT

I. The Bureau's Scoring System Is Arbitrary And Capricious.

The Bureau's scoring system is neither "reasonable" nor "reasonably explained," as required by the APA's arbitrary-and-capricious standard. *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012). "The APA's requirement of reasonableness incorporates basic principles of . . . equal treatment." *Balt. Gas & Elec. Co. v. FERC*, 954 F.3d 279, 286 (D.C. Cir. 2020). "[A]n agency must 'provide[] a reasoned explanation for . . . treating similar situations differently.'" *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)). But "[a]n agency has not engaged in reasoned decision making if it 'entirely failed to consider an important aspect of the problem.'" *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1025 (D.C. Cir. 2022) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Likewise, the agency must have considered "relevant factors" in reaching its decision. *State Farm*,

463 U.S. at 43 (internal quotation marks omitted) (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

The Bureau's differential treatment of District and federal offenders is arbitrary and capricious in several ways. To start, as plaintiffs explain, the Bureau has entirely failed to explain the reasons for its scoring system, and the system's differential treatment of District offenders makes no sense. Pls.' Br. 19-24. Moreover, as explained further below, the system's discrimination against District offenders contravenes both federal law and Bureau policy and regulations. These deficiencies also render the Bureau's system arbitrary and capricious.

A. The system's differential treatment of District offenders violates the Revitalization Act.

The Bureau's authority over District offenders derives from the Revitalization Act, yet its system "is at odds with the requirements of the applicable statute" and so "cannot survive judicial review." *United Parcel Serv., Inc. v. Postal Regul. Comm'n*, 955 F.3d 1038, 1050 (D.C. Cir. 2020).[16] The Revitalization Act states that District offenders "shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States consistent with the sentence imposed." D.C. Code § 24-101(a). In a Bureau Program Statement entitled "Inmate Security Designation and Custody Classification," the Bureau requires that federal

[16] Although the D.C. Circuit has held that, in equal protection cases, differential treatment of District defendants receives rational-basis review, *United States v. Cohen*, 733 F.2d 128, 135 (D.C. Cir. 1984) (en banc), this is an APA case with a higher standard of review, *see Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915-16 (2020) (holding an agency action arbitrary and capricious but not an equal protection violation). Arbitrary-and-capricious review requires that an agency reasonably explain its decision when making it and support its decision pursuant to certain statutory factors. *State Farm*, 463 U.S. at 43. In contrast, rational-basis review allows a court to come up with any plausible reason to sustain the law. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). Because this is an APA case, the Bureau cannot defend its differential treatment of District offenders based on speculation, nor can the Bureau ignore the parameters of the statutes and policies which govern the agency.

inmates' criminal history score be based on the U.S. Sentencing Guidelines' calculation of criminal history points. AR 35-36. That requirement is a "regulation"—i.e., rule—because it "substantially affects the rights of persons subject to" the Bureau's power: namely, inmates. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974); *see id.* at 1112-13 (holding that parole board's guidelines establishing specific factors to be considered in making parole decisions and their relative weight was a legislative rule under the APA); *Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998) (holding that a provision in a Program Statement establishing eligibility for sentence reduction was a rule); *Wiggins v. Wise*, 951 F. Supp. 614, 619-20 (S.D. W. Va. 1996) (same). Even if not a legislative rule under the APA, "the ordinary meaning of 'regulation'" can sweep more broadly to include any "'rule or order prescribed for management or government.'" *Stratford Sch. Dist., S.A.U. Dist. No. 58 v. Emps. Reins. Corp.*, 162 F.3d 718, 722 (1st Cir. 1998) (quoting *Regulation*, Black's Law Dictionary 1286 (6th ed. 1990)).

As such, District offenders should "be subject to" the same scoring system "applicable to persons committed for violations of laws of the United States." D.C. Code § 24-101(a). Yet the Bureau uses a scoring system for District offenders that differs in several ways. Pls.' Br. 4-6. For example, and as explained above, the Bureau's system for District offenders assigns points for prior sentences that the system for federal offenders does not. *Supra* pp. 7-8. Because the Act instructs that the Bureau "*shall*" apply the same policy to District and federal offenders, D.C. Code § 24-101(a) (emphasis added), the Bureau's departure from that instruction means it acted arbitrarily and capriciously, *United Parcel Serv.*, 955 F.3d at 1050-51.[17]

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[17] Notably, the Bureau cannot argue that it is impossible to use the same scoring system for District offenders because the Bureau *has* used the federal scoring system to calculate a District offender's score. Pls.' Br. 39; *see Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction . . . .").

Even if the Bureau's system does not violate the letter of the Revitalization Act, it undermines one of its key objectives: consistent treatment of federal and District offenders. An agency's actions "must be tied, even if loosely, to the purposes of" the laws they administer. *Judulang v. Holder*, 565 U.S. 42, 55 (2011); *see also Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 413 (1983) (explaining that, to decide whether a rate-setting rule was arbitrary and capricious, the court "must determine whether the agency adequately considered the factors relevant to choosing a rate that will best serve the purposes of the statute"). From the moment the White House proposed the Revitalization Act, it emphasized consistency of treatment. *Supra* pp. 7-8. And in the name of consistency, the District sacrificed much of its sovereignty over its criminal law: the final Act inserted the federal government into a decades-long process of amending District sentencing law. *Id.*

Despite this importance of consistency embedded in the Revitalization Act, the scoring system treats District offenders worse than federal offenders today. The scoring system is therefore at least in substantial tension with the Revitalization Act's goals, and the Bureau made no effort to explain its departure from those purposes. For that reason, the disparate scoring system is arbitrary and capricious.

B. The system's disparate impact on Black inmates violates a Bureau regulation and policy.

Because the District scoring system results in higher security classifications for District offenders, and because District offenders are almost exclusively Black, a disproportionate number of Black inmates are assigned to high-security facilities. Pls.' Br. 22. Yet the Bureau committed itself, in a regulation and Program Statement, to eradicating policies with a disparate impact on inmates of one race. By violating its regulation and prior pronouncements, the Bureau acted arbitrarily and capriciously. *See Shafer & Freeman Lakes Env't Conservation Corp. v. FERC*, 992

F.3d 1071, 1095 (D.C. Cir. 2021) (holding that an agency acts arbitrarily and capriciously if it ignores or violates an applicable regulation); *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (explaining that agency acts arbitrarily and capriciously when, even if its "discretion is unfettered," "it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed" yet departs from that policy).

First, the system violates a Bureau regulation providing that "staff shall not discriminate against inmates on the basis of race . . . . This includes the making of administrative decisions and providing access to work, housing and programs." 28 C.F.R. § 551.90. The term "discriminate" sweeps broadly enough to encompass a disparate racial impact. *See Bd. of Ed. of City Sch. Dist. of N.Y. v. Harris*, 444 U.S. 130, 140-41 (1979) (holding that the term "discriminate" could include disparate impact, which the context of the statute at issue confirmed); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52-53 (2003) (explaining how disparate impact and differential treatment are both ways to "discriminate"); *cf. DaVita Inc. v. Amy's Kitchen, Inc.*, 981 F.3d 664, 674 (9th Cir. 2020) ("Congress' decision *not* to use the word 'discriminate' in [a statute] strongly suggests that it did *not* intend to encompass disparate-impact liability."). Indeed, when a provision prohibits discrimination without further specifications, it indicates that it includes both forms of discrimination: differential treatment and disparate impact. *See DiCocco v. Garland*, 18 F.4th 406, 425 (4th Cir. 2021) (Floyd, J., concurring in part and dissenting in part) (concluding that a statute that prohibited "'any discrimination' must include both disparate-treatment and disparate-impact claims because they are distinct types of discrimination"), *reh'g en banc granted*, No. 21-1342, 2022 WL 832505 (4th Cir. Mar. 21, 2022); *Breen v. Peters*, 474 F. Supp. 2d 1, 6 (D.D.C. 2007) (same).

Notably, in proposing, adopting, and amending the regulation, the Bureau never suggested that "discriminate" excludes disparate impact.[18] In fact, the Bureau has suggested in a Supreme Court brief that the regulation prohibits policies that result in a disparate racial impact. *See Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011) (accepting as authoritative an agency interpretation, in a brief, of a regulation that was consistent with the regulatory text). In its brief in *Johnson v. California*, 543 U.S. 499 (2005), the federal government represented that the Bureau, pursuant to 28 C.F.R. § 551.90, "monitors the racial composition of its institutions and may consider race in overseeing the population of an institution as necessary to ensure that the institution does not become de facto segregated." Brief for the United States as Amicus Curiae Supporting Petitioner at 25, *Johnson v. California*, 543 U.S. 499 (2005) (No. 03-636); *see also Johnson*, 543 U.S. at 508 (stating that 28 C.F.R. § 551.90 "expressly prohibit[s] racial segregation"). De facto segregation, the Supreme Court has explained, is a form of disparate impact because it is unintended. *See Harris*, 444 U.S. at 141. Thus, if a provision aims to end de facto segregation, it implicitly recognizes disparate impact liability. *Id.*; *see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539-40 (2015) (recognizing that disparate impact liability has been key to eradicating racial segregation in housing in the decades following the end of de jure segregation).

Second, the Bureau's system runs afoul of Program Statement 1040.04, which provides that "[a]ssignments in housing, work and programs will be available to inmates on an equal opportunity basis" and directs wardens to "review and, as necessary, establish local procedures to

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[18] *See* Control, Custody, Care, Treatment, and Instruction of Inmates; Proposed Rulemaking and Request for Comments, 44 Fed. Reg. 62,252, 62,252 (Oct. 29, 1979); Control, Custody, Care, Treatment, and Instruction of Inmates, 45 Fed. Reg. 23,364, 23,364 (Apr. 4, 1980); Non-Discrimination Towards Inmates, 63 Fed. Reg. 55,774, 55,774 (Oct. 16, 1998).

ensure that inmates are provided essential equality of opportunity in . . . decisions concerning classification status." U.S. Dep't of Just., Fed. Bureau of Prisons, *Program Statement 1040.04* at 1-2 (Jan. 29, 1999).[19] The Bureau's use of the phrases "equal opportunity" and "equality of opportunity" is significant because those phrases are closely associated with disparate impact claims. For instance, in the first case to interpret a statute to recognize disparate impact liability, the Supreme Court explained that, by promising "equality of employment opportunities," Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). Later, the Court elaborated, "[w]hen an employer uses a nonjob-related barrier in order to deny a minority . . . applicant employment or promotion, and that barrier has a significant adverse effect on minorities . . . , then the applicant has been deprived of an employment *opportunity* 'because of . . . race.'" *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). In other words, "[a] disparate-impact claim reflects the language of [Title VII]"—which "speaks . . . in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*"—"and Congress' basic objectives in enacting that statute: 'to achieve equality of employment *opportunities*.'" *Id.* (quoting *Griggs*, 401 U.S. at 429-30).

Program Statement 1040.04 similarly provides for equality of opportunity, so it prohibits disparate racial impacts. By continuing to use the scoring system, then, the Bureau has plainly failed to comply with Program Statement 1040.04. The Bureau has erected a barrier—the scoring system's artificial inflation of District offenders' criminal history scores—that deprives those offenders of the opportunity to receive lower security classifications. And that barrier has a

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[19] *Available at* https://tinyurl.com/3exawdck.

significant adverse effect on Black inmates, who make up almost all District offenders. Bureau wardens have thus failed to "ensure" that District inmates can access lower security classifications.

In sum, the plain text of a Bureau regulation and Program Statement commit the Bureau to actions that avoid a disparate impact on inmates of one race. Even if the Bureau interprets its prior pronouncements differently, at a minimum it must explain why it believes they do not apply to the scoring system. *See Shafer*, 992 F.3d at 1095 ("By dropping the ball entirely in analyzing and explaining its compliance with [its regulation], the [agency] failed to address a relevant and substantial matter bearing directly on its action."). By ignoring its longstanding regulation and policy without explanation, the Bureau has acted arbitrarily and capriciously.

II. The Lack Of Notice-And-Comment Rulemaking Deprived The Attorney General Of An Opportunity To Comment On The Scoring System.

The scoring system is a legislative rule that required notice-and-comment rulemaking. *See* Pls.' Br. 31-36. The lack of those procedures deprived the District of any involvement in making a policy that detrimentally affects individuals in the District's criminal justice system. The Bureau thus undermined a key purpose of the APA: "to subject agency decisionmaking to public input and to obligate the agency to consider and respond to the material comments and concerns that are voiced." *Make the Road N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020). That is, notice-and-comment rulemaking allows "an exchange of views, information, and criticism between interested persons and the agency," *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (per curiam), so that the "agency will have before it the facts and information relevant to a particular administrative problem," *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (internal quotation marks omitted) (quoting *Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982)).

The Bureau's bypass of notice-and-comment procedures here is particularly troubling given that the agency is not solely responsible for District offenders. Rather, "[t]he Attorney General for the District of Columbia is responsible for 'all law business of the . . . District'" and so represents the District's interests in criminal justice, even if the U.S. Attorney's Office prosecutes the offense. *Crockett*, 95 A.3d at 605 (quoting D.C. Code § 1-301.81(a)(1)). More broadly, the Attorney General represents the "public interest" of District residents, *id.*, who are subject to the Bureau's policy if ever convicted of a felony. In short, the Attorney General is an "interested person[]" who should have been given "an opportunity to participate in the rule making." 5 U.S.C. § 553(c).

Not only that, but the Attorney General could also have meaningfully contributed to crafting a scoring system. The Attorney General is a member of the District of Columbia Sentencing Commission, which promulgates the voluntary sentencing guidelines for D.C. Code offenses. D.C. Code §§ 3-101(b)(1), 3-102(a)(1)(E). An inmate's current and prior sentence are key to his or her criminal history score. AR 35-36. The Attorney General could therefore have shared his expertise on sentencing for D.C. Code offenses and advised the Bureau how D.C. Code sentences could be used in a congruent way compared to federal sentences when calculating a criminal history score. In addition, the Attorney General could have voiced concerns about how higher security classifications for District offenders affect the District's criminal justice policies, which emphasize successful rehabilitation and reintegration.

At bottom, the District's criminal justice system is unique because it involves both federal and District policymakers. Nevertheless, the Bureau shut out the District from any say in a policy that adversely affects its residents and its criminal justice system. The resulting policy ignored several relevant considerations, to which the Attorney General could have alerted the Bureau. For

those reasons, vacatur and remand for notice-and-comment rulemaking is warranted because the Attorney General "'ha[s] something useful to say' regarding" the scoring system "that may allow [him] to 'mount a credible challenge' if given the opportunity to comment." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237-38 (D.C. Cir. 2008) (quoting *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 905 (D.C. Cir. 2006), and *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002)); *see also Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020) (explaining that "cases 'in which a government agency seeks to promulgate a rule by another name—evading altogether the notice and comment requirements'" are "the 'most egregious' breaches of notice-and-comment obligations" and require vacatur (quoting *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014))).

III. The Public Interest Weighs In Favor Of Injunctive Relief.

The Bureau's substantive and procedural errors warrant vacatur of the disparate scoring system, but to the extent the Court also considers injunctive relief requiring the Bureau to immediately recalculate District offenders' criminal history score, this Court should weigh the District's interests in an injunction. In determining whether to grant an injunction, this Court considers, among other factors, the public interest. *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 157 (2010). The maxim that "the government's interest *is* the public interest" applies equally to the District government. *District of Columbia v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1, 45 (D.D.C. 2020) (internal quotation marks omitted) (quoting *Pursuing Am.'s Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016)); *see Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 789 (7th Cir. 2011) (explaining that both federal and state governments "represent the interests of the public"). In other words, an analysis of the public interest here is not complete without weighing the District's interest and the Attorney General's views as a stakeholder in the District's criminal justice system. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)

(explaining that courts "should pay particular regard for the public consequences" of issuing an injunction (internal quotation marks omitted) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014) ("The public interest inquiry primarily addresses impact on non-parties rather than parties." (internal quotation marks omitted) (quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002))); *Jones v. District of Columbia*, 177 F. Supp. 3d 542, 546 n.3 (D.D.C. 2016) (same). Here, an injunction would serve the District's interests in (1) compliance with the Revitalization Act, (2) equal treatment, and (3) criminal justice.

First, "there is a substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations.'" *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)). The Revitalization Act governs the Bureau's charge of District offenders. D.C. Code § 24-101. As explained above, however, the Bureau's system violates both the letter and spirit of the Act by failing to treat District offenders consistently with federal offenders. *See* Part I.A.1, *supra*. The system thus "runs contrary to what Congress" and the District "declared to be the public interest" "in enacting" the Revitalization Act. *League of Women Voters*, 838 F.3d at 13.

Second, the District is committed to ensuring that its residents, as well as individuals subject to its criminal justice system, are treated fairly, but the system here undermines equal treatment. "[T]he public as a whole has a significant interest in ensuring equal protection of the laws . . . ." *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (internal quotation marks omitted) (quoting *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995)); *see also Jean-Baptiste v. District of Columbia*, 958 F. Supp. 2d 37, 51 (D.D.C. 2013)

(finding that injunction served "public interests in remedying and preventing discrimination"). The public interest in equal treatment holds true even in the context of prisons. *See Johnson*, 543 U.S. at 510 (holding that the right to equal treatment on the basis of race "is not a right that need necessarily be compromised for the sake of proper prison administration"); *Pitts v. Thornburgh*, 866 F.2d 1450, 1454-55 (D.C. Cir. 1989) (same but regarding equal treatment on the basis of sex); *Victory v. Berks County*, 355 F. Supp. 3d 239, 254-55 (E.D. Pa. 2019) (holding that public interest was served by injunction ensuring equal treatment of female inmate with male inmates of same security risk).

Here, an injunction would serve the public interest in equal treatment in two specific ways. For one, the Bureau's system treats District offenders differently from federal offenders, and District residents have a strong interest in seeing that the District is treated fairly in our federalist system. For another, as explained, the Bureau's system disproportionately affects Black inmates, and District residents reported that racial discrimination concerned them more than any other form of invidious treatment. Karl A. Racine, Att'y Gen. for the Dist. of Columbia, *Community Voices: Perspectives on Civil Rights in the District of Columbia* 5 (Nov. 2019).[20] Thus, requiring that District offenders' criminal history scores be calculated the same way as federal offenders will serve the District's interests in equal treatment.

Third, ending this discriminatory scoring practice will serve the District's criminal justice system. That system aims to reduce recidivism and rehabilitate offenders so that they can reintegrate into the District community. Off. of the Att'y Gen. for the Dist. of Columbia, *AG Racine Testimony on the Office of the Attorney General's Work to Stand Up for District Residents*

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[20] *Available at* https://tinyurl.com/dc-community-voices.

(Feb. 10, 2022).[21] Standing in the way of reducing recidivism are prison practices that bump up inmates into higher security classifications. To illustrate, one study identified federal inmates with similar security scores but who were classified at two different security levels. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach* 2-3 (2007).[22] The inmates placed at higher security facilities had higher rates of recidivism than their counterparts with similar security scores in lower security facilities. *Id.* at 9-10. Indeed, higher security facilities do not provide a conducive environment to facilitate successful reintegration into the community. *Id.* at 5-6. Thus, an injunction here would help prevent and correct misplacements that can increase District offenders' risk of recidivism. *See, e.g.*, *Staples v. N.H. State Prison*, No. 14-cv-473, 2015 WL 4067139, at *26 (D.N.H. July 2, 2015) (relying on similar research to find that an injunction was in the public interest).

Further, "the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair.'" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (quoting Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215-16 (2012)). The Bureau's procedures are neither consistent nor fair because they result in offenders with similar criminal histories receiving different criminal history scores, leading to higher security classifications. Public perception of justice in the District suffers for that reason, as District offenders and residents may perceive that those convicted in District courts will be sent to higher security facilities than similarly situated federal offenders. Indeed, District offenders already perceive the Bureau as treating District offenders unfairly. *See supra* pp. 6-7.

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21 *Available at* https://tinyurl.com/mr4demp7.

22 *Available at* https://tinyurl.com/tutcr4zk.

To correct that unfairness, this Court should enjoin the Bureau from further using its discriminatory scoring system and require the Bureau to correct current District offenders' criminal history scores.

CONCLUSION

The Court should grant the plaintiffs' motion for summary judgment.

Respectfully submitted,

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